# No. 11,443

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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LUCIEN P. BRASSY, upon his own behalf and upon behalf of Robert P. Easley (deceased) and Lucien P. Brassy, as co-partners doing business under the firm name and style of Easley & Brassy,

*Appellant,*

vs.

THE PERMANENTE METALS CORPORATION (Richmond Shipyard Number Two), (a corporation),

*Appellee.*

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## APPELLANT'S REPLY BRIEF.



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### COMMENTS ON ERRORS IN APPELLEE'S BRIEF.

In footnote (7), page 5 under heading A. Questions Involved and Manner in which Raised the Appellee makes the following quoted statement:

> "Second, at no time previously, either in the pleadings or during the trial of the case or the arguments before the Court, has the Appellant raised the question of the applicability of Maximum Price Regulation No. 134 to this case."

The Appellee clearly is in error in this statement. In oral argument before the lower Court, transcript of which was made at the request of the Court, Mr. Winters, counsel for the Appellant, made the following statement:

> "Now, in the agreements the plaintiff also agreed to hold the defendant free and harmless from any and all claims for loss or damage to the leased property, and the defendant assumed all risks and hazards of loss and damage to the leased property during the entire terms of the agreements. In addition to these commitments, warranties and obligations on the part of the plaintiff, a further obligation was imposed upon the plaintiff by a separate OPA regulation identified as Regulation MPR No. 134, relating exclusively to the rental of equipment such as that involved in this case. By the terms of section 1399.14 of this regulation No. 134, the plaintiff in this case was obliged to make and pay the cost of repairs and overhaul required as a result of normal wear and tear, and the plaintiff lost the rental of the equipment during the time while the repairs were being made.
>
> Now, this provision of the OPA regulations supersedes any contrary provisions in a contract between the parties. By express provision of law, section 4(a) of the Emergency Price Control Act of 1942, as amended, the regulations are made to supersede any contrary provisions in a contract between the parties.
>
> These promises and obligations of the plaintiff in this case are certainly more definite and extensive than the vague guarantee referred to in the regulations.

> Superadded to all of these commitments on the part of the plaintiff is the fact that in each case, with respect to each of the machines, they did perform satisfactorily in every respect for periods of sixty days and much longer after delivery to the defendant."

In response, Mr. Johnson, counsel for the Appellee, stated in part "Well, it is true what Mr. Winters says about the OPA regulation 134 and the rental of construction equipment, but I think the point he misses there is that the OPA regulation is that there should be a binding written guarantee, not a guarantee imposed by law."

Later, and during the same oral argument the counsel for the Appellant amplified his statement as follows:

> "And another point is raised by Mr. Johnson regarding the provision of the contract and each of the contracts to the effect that the company shall make repairs necessary to maintain the property in good operating condition, provided that such repairs are made necessary by normal operation, and bear the cost of fuel, lubricants and supplies necessary for the operation of the leased property by the company. I should like to again emphasize that that provision is not binding under section 4(a) of the Emergency Price Control Act of 1942, as amended. I will read the portions that are applicable to this situation.
>
> 'It shall be unlawful, regardless of any contract or agreement or other obligation hereinafter entered into for any person to omit or do

any act in violation of any regulation or order under section 2, or of any price schedule,' and so on.

So that by that express provision of the statute this provision would not be the binding provision, but the one that is set forth in regulation 134, requiring the plaintiff to make all repairs, including those that are occasioned by normal wear and tear'' would prevail.

(See page 12, line 19 to and including line 22, page 13; lines 16 to 20, inclusive, page 28; and lines 1 to 21, inclusive, page 42, of typewritten Reporter's Transcript, Monday, December 10, 1945, not printed in the Record.)

In the Statement of Issues on pages 9 and 13, and in the Argument on page 65 of its brief the Appellee sets out a portion only of the testimony of a witness relative to the cost to the Appellant of the larger crane. The Appellee in its brief presents this portion of the testimony as the complete evidence on the matter. It should be obvious that the evidence relative to the cost to Appellant of the crane is completely immaterial to the case. The admission of this evidence was objected to on that ground at the trial, but it was admitted, nonetheless, in error, by the Court. Specifically, on page 9 of its brief, the Appellee states: ''The larger crane was a used crane purchased by Appellant in May or June of 1942 (at which time it was approximately 4 years old) for which Appellant paid $14,000.00. (R. 254.)'' At page 13 of its brief the Appellee says: ''All of this for a used

Crane which, as noted above, Appellant bought for $14,000.00 in 1942." On page 65 of its brief the Appellee says: "Appellant testified that a year before he rented the crane to Appellee he paid $14,000.00 for it. (R. 254.) It does not seem likely that after a year's further use the crane had increased in value in an amount greater than $10,000.00." The correct testimony of Appellant on this point we find, by reference to page 254 of the Record, to be as follows: "Q. What did you pay for it?" (meaning the crane.) "A. The crane f.o.b." (transcribed in error "Ethel B.") "Winnemucca was $14,000.00." In addition to this, it was testified that the crane was transported to San Francisco and overhauled (R. 281) after the original purchase by Appellant, and that a lot of work was done on the machine and the machine put into condition to operate in a manner substantially equivalent to a new machine (R. 326) and maintained in that condition (R. 315) and that the ordinary life of the machine in good working condition was around 20 to 25 years (R. 264)—that the machine was not built for a year or so's wear, and was not like an automobile.

The Appellee's emphasis on the partial evidence of cost represents an obvious effort to appeal to prejudice even though the evidence shows clearly and the Appellee stipulated at the trial that the OPA new base price for the crane was $35,320.00 (R. 311-313) and the Appellee has admitted throughout the proceedings that either 85% or 55% of the new base price is applicable in this case.

On page 6 of its brief the Appellee refers to "the shipyards at Richmond, California, which it was operating for the United States Maritime Commission." The only evidence in the record is that Appellee was operating the shipyard for itself, and it is common knowledge that it did so at a handsome profit to itself. Appellant's contracts were with Appellee only and the evidence in the case shows only that the Maritime Commission had a contract with Appellee for the supplying of certain construction work and products.

In its statement of the issues on page 15 of its brief the Appellee states: "Appellee (meaning Appellant) is not entitled to reformation because the written contract" (referring to the 3 months extension agreement identified as Change Order No. 1) "reads exactly as it was intended to read and there is no mistake in its terms." The statement is repeated in substance in Appellee's argument. That statement is not true unless the following proposition is correct, namely, that the phrase "Except as herein modified the terms and conditions of said Rental Agreement No. PD-482, dated May 4, 1943, shall continue in full force and effect" contained in said Change Order No. 1 (R. 38, 39) does carry over to apply throughout the extended period the null and inoperative recapture clause, contained in the original rental agreement, which Appellant contends that it does in accordance with the agreed intention and understanding of the parties. The inoperability of the recapture clause was as much a term and condition of the original lease as any other contained therein. Should that not be the conclusion of this Court then obviously the

language of the Change Order failed to express the intention of the parties in a most material respect (R. 142, 143, 144, 289, 290, 297) and the omission was due to the mutual mistake of the Appellee and Appellant. (R. 150, 151, 294.)

**The OPA Regulation Issue.**

The Appellee drafted the so-called rental-purchase agreements involved in this suit. (R. 144, 288, 289, 292.) The Appellee checked the prices stated in the agreements to determine that they did not exceed the Maximum OPA prices. (R. 301.) It is unconscionable now to permit the Appellee to get away with machinery having an aggregate value in excess of $41,000.00 (R. 68, 69, 71, 164, 311, 312, 313) by permitting Appellee to say that it failed to include in the agreements that it prepared the words "satisfactory operation guaranteed for 60 days" when the uncontroverted evidence in the case shows clearly and convincingly (1) that the machines did operate to the entire satisfaction of Appellee, and as well or better than new machines, for periods greatly in excess of 60 days after delivery to it (R. 263, 264, 265, 266, 268, 309, 310, 315, 323, 324, 325, 326) and before exercise of the option to purchase the smaller 602 crane was attempted, (2) that Appellant was required under OPA Regulations 134 to make and did make all repairs even though occasioned by normal wear and tear (R. 323, 324, 325, 326, 329), (3) that Appellant warranted in writing that the cranes were in good operating condition when delivered to Appellee and if at any time, not just for 60 days, 6 months or a year, but

any time there should be discovered broken, defective or badly worn parts existing at the time of delivery of the cranes, the Appellant would correct such defects and/or pay all the costs thereof (R. 17, 18, 30), (4) that the Appellant held Appellee free and harmless from any and all claims for loss or damage to the cranes (R. 18, 19, 31), and with respect to the larger 701 crane that Appellant told Appellee that "if there was anything wrong with the machine or anything that he" (Appellee) "found after he" (Appellee) "got over there" (meaning Appellee's shipyard) for Appellee to use its own discretion and Appellant would stand the bill (R. 326), and under the express terms of each of the agreements the Appellee, The Permanente Metals Corporation (but not the Appellant), could terminate the rental agreements on 7 days notice for any reason or for no reason whatever. (R. 16, 30.)

**The OPA Regulation 136 does not apply to this case.**

The point that Appellee misses in contending in its brief that OPA Regulation M.P.R. 136 controls the agreements involved in this case is this: All payments made by Appellee to Appellant (with the exception of the final tender of $736.56 to purchase the smaller 602 crane and some additional equipment (R. 124, 125), and the final tender of $2,098.07 to purchase the large 701 crane and additional equipment) (R. 160) were rental payments, originally and entirely for all purposes, and these payments were not payments singly or in the aggregate of purchase prices. This is clearly the case with respect to the larger

701 crane because the agreement relating to this crane expressly provided for no payments other than rental payments. There was no option or right granted to Appellee in that agreement or its extension to purchase the large crane. In fact, the understanding and agreement throughout was that the large crane was not to be sold. An inoperative recapture clause was put into this agreement simply to comply pro forma with a request of the Appellee. With respect to the smaller 602 crane, the Appellant simply agreed in effect, and at the request of Appellee, which he was not required to do by any law or regulation, OPA or otherwise, to reduce the purchase price by the amount of the rentals paid prior to the exercise of an option to purchase. The Appellee paid rentals in the aggregate amount of $14,880.69 for the use of this crane, and then tendered as purchase price for the crane and additional equipment only the remaining amount of $736.56. The tender of $2,098.07 with respect to the larger crane and additional equipment was made specifically by the Appellee as purchase price. The Appellee was not entitled to purchase this crane and equipment and the Appellant was entitled to claim or collect no purchase price for the same, but only rentals. To this day Appellee admits ultimately and in effect that rentals in the aggregate recapture value of $24,000.00 have neither been paid nor tendered. The entire record bears this out. The OPA regulations do not and did not prohibit the renting of cranes. They simply prescribed maximum rentals where a lease was made. Neither the OPA nor any

other regulations or laws required a recapture clause or option to purchase to be included in a rental agreement of the kind involved in this case. The Appellee, and mind you not the Maritime Commission, but the Appellee without the further consent of the Maritime Commission, could have cancelled both the rental agreements any time after the first week and before rentals reached recapture values, and it would have suffered no loss but would have been in a position of having paid only the reasonable and prescribed OPA rentals for the use of the machines.

If we take Appellee's view of the agreements, namely, that they were agreements to sell for prices in excess of those permitted by the OPA Regulations, then we find the Appellee still thwarted in its attempt to get away with property worth more than $41,000.00 because such agreements insofar as they are agreements to sell would be unlawful and therefore void, and Appellee would be entitled to take nothing thereunder. The agreements were made and were to be excuted within the State of California and they would be controlled, therefore, by the laws of that state which, on this point, provide as follows:

> "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." (See The Civil Code of the State of California, Section 1599.)
>
> "The illegality vitiates the contract between the immediate parties, as well as in respect to third

parties." (See 6 *Cal. Jur.* 150, Sec. 106, and cases therein cited.)

The validity of the agreements as rental contracts or leases is beyond question and is admitted by all parties, and enforceable as such and only to that extent.

> "* * * it is both familiar and declared law that where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, the contract is void as to the latter and valid as to the rest. The valid portion of a demand may be enforced where separable from that part which is void." (See 6 *Cal. Jur.* 149, Sec. 105.)

Moreover, the impossibility of the application of MPR 136 to the transactions in this matter is apparent under Appellee's theory of the case for the Appellee states in its brief on page 28 that "M.P.R. 136 is concerned with the price which may be charged by a seller of machines, and requires that if the seller wishes to charge a maximum of 85% rather than 55% of the new base price, he *must* guarantee that the operation of the machine will be satisfactory for a period of not less than 60 days *following the passage of title.*" The fallacy of this lies in the fact that under the terms of the particular agreements in this case the machines were delivered to Appellee on a rental basis in the beginning. Thereafter and for the terms of the agreements Appellant was not entitled to possession of the machines or to deal with them in any respect. The Appellant had no access to

the machines and was not in a position any time during that period to recondition, repair or rebuild the machines as required under OPA Regulations 136, and yet it rested within the power of Appellee with respect to the smaller crane to cause a sale to take place at any time during the period that it chose, and with respect to the larger crane under Appellee's theory of the case, to hold onto the crane during the extended period, until the recapture clause effected a sale. It was impossible under these circumstances for the Appellant to meet the requirements of the regulations as Appellee interprets them. An 85% sale never could be effected under such conditions. The law never requires impossibilities and an interpretation which gives effect is preferred to one which makes void. The chief counsel of the Machinery Branch of OPA held that the condition of the machines and the obligations under the lease at the time of delivery was controlling, and stated:

> "We believe it is sound to find the guaranty requirement satisfied where a co-extensive obligation is imposed even though not entitled 'guaranty'.
>
> The above reasoning would not apply where an option to purchase was exercised in less than sixty days, since there would have been no sixty-day period of responsibility for the lessor."

**Appellee is incorrect in its contention that the 55% price should apply.**

The OPA Regulation 136 will have to be read as it was when the transactions took place, and not as Appellee would like to have it read. It is an admitted

fact in this case that the regulation established at least an 85% ceiling price for a rebuilt machine, whether it was guaranteed or not, on the date the transaction took place with respect to the larger 701 crane. The regulation stated clearly and unequivocally,

> "The maximum price for any rebuilt *or* guaranteed second-hand machine or part shall be the *higher* of the following:
>
> (1) 85% of the new base price for such machine or part, or"
>
> (2) (a depreciation method of pricing with which we are not concerned in this case.)

The Appellee pleads to this Court to hold the Appellant to all the hypertechnical provisions of the regulation, whether reasonable or not, excepting, mind you, just the one only that defeats its case.

Further, Appellee argues that OPA rental regulation M.P.R. 134 had no bearing upon the issues in this case. The Appellee states "The coverage of M.P.R. 134 and M.P.R. 136, respectively, demonstrates that they are concerned with entirely different types of transactions. M.P.R. 134 has to do only with the obligations of a lessor under a rental arrangement. M.P.R. 136 is concerned with the price which may be charged by a seller of machines," etc. This is not so. The two regulations are interrelated and have reference specifically to similar subject matter. The coverage clause of M.P.R. 136 (Art. I, Sec. 1) states in part:

"Scope — (a) Commodities and transactions. Except as provided in the next Section 2, this regulation establishes maximum prices for all sales, rentals and leases of unused or second-hand products that fall within the groups listed in Appendix A."

Section 2 does not except crawler cranes, and Appendix A lists crawler cranes. M.P.R. 134 supplements M.P.R. 136 by prescribing rental ceiling prices, and M.P.R. 134 provides in part at Section 1399.5 (e) thereof as follows:

"The provisions of Section 1390.25a (b) of Maximum Price Regulation No. 136, as amended—machines and parts, and machinery services—are hereby incorporated herein as a part of this regulation."

The Appellee calls Appellant's argument "a bit vague", and the Appellee purports to set forth in its brief the "pertinent provisions" of M.P.R. 134. After reading Appellee's quotation of "pertinent provisions" the advisability of our quoting the entire section referred to is apparent, which we do as follows:

"Sec. 1399.14. Rental Rates—General Provisions.—Rental rates as set forth in the following Tables of Rates (Secs. 1399.15 and 1399.16) are for 'bare' equipment, unless otherwise specifically provided, and do not include charges for operator, mechanic, oiler, fuel, oil, lubricants, repairs, or maintenance (except repairs or maintenance due to normal wear and tear), or any other charge, which is properly a part of any 'operating and

maintenance service,' as herein defined. The rental rates set forth in these tables do include allowance for the cost of all repairs and overhaul, required as a result of normal wear and tear of equipment. This means that: (a) When equipment is on bare rental and breaks down as a result of normal wear and tear, lessor cannot charge lessee with the cost of repairs, or any rental for time lost while repairs are being made. (b) Where equipment is on bare rental and breaks down as a result of any cause other than normal wear and tear, lessor can charge lessee with the cost of repairs and with rental for possession of equipment during time while repairs are being made. (c) However, where equipment is on bare rental, the lessee may at his own expense always make minor repairs, regardless of the cause of breakdown, where such repairs are necessary to keep the job going, but he may not charge the cost of such repairs to the lessor, or deduct the time lost for making repairs from the rental period, without the lessor's consent. (d) In any instance where there is a breakdown of equipment on bare rental, the cause of such breakdown is a question of fact that must be determined between the lessor and the lessee. (e) In any instance where there is a breakdown of equipment on fully operated rental, the lessor cannot charge the lessee with any rental, or for any operating and maintenance service, for the time lost during the breakdown, or with the costs of any repairs occasioned thereby."

The "bare" rental rates were agreed to be paid in the contracts involved in this case. Those rental rates,

therefore, compensated appellant for repairs and maintenance due to normal wear and tear. To keep the machines running and collect the prescribed rentals, which he did, the Appellant was required to and did make all repairs and do all maintenance work due to normal wear and tear, as the record will show, and the Appellee was in a position at all times to require the Appellant to so do.

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### PRICE ADMINISTRATION RULING.

The Appellee refers to "the ruling of the Office of Price Administration". (Appellee's Brief, page 31.) The letter of the OPA was not a ruling. As was stated by the Court in *Southern Goods Corporation v. Bowles* (C.C.A. 4, 1946), 158 F. 2d 587, 590:

> "Being merely a letter of advice with regard to the administration of the act promulgated by assistant general counsel for the guidance of price attorneys operating under the office, it is not entitled to the weight that the courts accord to an administrative interpretation evidenced by settled administrative practice."

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### TITLE DID NOT PASS UPON PAYMENT EQUALLING THE SELLING PRICE.

The Appellee cites the *El Paso Furniture Company* case and the *Scott Furniture Company* case in support of its contention that upon payment of a sum of money equalling the selling price, title passed even

though the contract provided for the payment of a larger sum. (Appellee's Brief, pages 33, 34.) These cases are not applicable. In both of them the plaintiff sought equitable relief to which it was entitled only if such relief were consistent with the statute, and since the plaintiff had collected the selling price, it was entitled to no relief. In both cases the relief was sought from a purchaser for consumption who was entitled to protection under the OPA. In the case at Bar the Appellant sought relief both at law and equity from a purchaser in the course of trade and business who was not entitled to protection, but had a duty coequal with that of the Appellant to ascertain and comply with the requirements of the OPA. The first and second causes of action are at law and the principles set forth in Appellant's Opening Brief, Argument II at page 42 are controlling.

So far as the relief sought in the third and fourth causes of action is concerned, if the contracts did provide for payment in excess of the ceiling established by OPA and if the Court should decide that they are illegal contracts for that reason, then equity would leave the parties as it found them and the Appellee would not be entitled to recover upon its counterclaim. *Enterprise Frame & Novelty Corp.* (1944), 183 Misc. 3, 49 N.Y.S. (2d) 860; *Morgan Ice Co. v. Barfield* (Texas, 1945), 190 S.W. (2d) 847. In the latter case an action was brought upon a contract to recover damages for the breach thereof by a purchaser against his vendor. The purchaser who had agreed to purchase at a price in excess of the ceiling

established by OPA was engaged in business and the purchased product was for resale in business. The Court, in reversing a judgment for the purchaser, said at page 848:

> "The rule is, both under the Federal and State authorities, that where parties who are charged with the knowledge of the law (the Act above referred to and the rulings and ceiling prices fixed pursuant to its provisions constitute the law), undertake to enter into a contract in violation thereof they will be left in the position in which they put themselves."

**The United States Maritime Commission was not a party to the contracts.**

The Appellant is asking for no relief from or remedy against the Maritime Commission. The Maritime Commission is not a party to the contracts and for that reason alone may not be made a proper party to an action founded upon the contracts. The only remedies Appellant asks are of the wrongs of Appellee because it is the only party with whom privity of contract exists.

Appellee's position essentially is this: Because Appellee insisted (for its part and in its own interest alone for the reason that the Maritime Commission apparently was policing the actions of Appellee, one of its war contractors), that the Commission approve the agreements, and the Commission did approve them in so far as its war contractor was concerned, that therefore Appellee is entitled to violate the contracts in any and all respects and claim immunity from

all justice and recourse because Appellant may not sue the government.

The record shows nothing more than that the purpose of the vesting of title in the Commission upon complete performance of the contracts, and the initial approval of the contracts by the Commission, were merely to permit policing by the Commission of the actions of its war contractor.

In any event, no rights of the Maritime Commission could attach or be involved unless or until the contracts have been completely performed according to their true tenor, and that is what all the argument is about—whether or not the contracts have been so completely performed. That question can and of necessity must be determined in an action between the two contracting parties only. If the contracts have been completely performed title vests automatically in the Commission and no recourse has been requested by the Appellant in such event and none could be granted. If the contracts have not been completely performed according to their true tenor then no rights of the government are involved. We need not turn back in our search for an answer because this war contractor in his bewildered retreat snatches what he thinks is the nearest American flag and waves it in front of himself.

RESCISSION AS AFFECTED BY THIRD PARTY BENEFICIARY.

APPELLEE'S AUTHORITIES.

The *Jurgens Co.* case cited by the Appellee (Appellee's Brief, page 41) as authority for the proposition that voluntary rescission cannot be effected except with the consent of a third party beneficiary who has accepted the contract is not authority for that broad proposition. In that case the insured sought to rescind an insurance contract upon the ground of fraud. The Court noted that the offer to rescind was an offer to release the opposite party, the insurer, from the obligations of the contract. The Court noted further that the obligation imposed by the contract upon the defendant insurer was to the plaintiff, the insured, and his wife, the beneficiary, and held that both should join in demanding a rescission, for though the husband could release for himself, he could not release for his wife. That case is distinguishable upon the facts, for here under the contract sought to be rescinded, the defendant had a unilateral obligation. Under the contract sought to be rescinded in this action, no obligation to the United States was imposed upon the defendant.

A. *L. R. Annotations* (Appellee's Brief, page 41.) The annotations cited, namely 53 A. L. R. 181 and 81 A. L. R. 1294, do state that after acceptance by a third party beneficiary, the contract cannot be rescinded by the parties thereto, "*so as to deprive him of his benefits.*" (Emphasis added.) (53 A. L. R. 181.) Appellant has repeatedly admitted and asserted

that it does not seek to deprive the United States of any benefit it may have acquired under the contract.

*State v. Hyde* (Appellee's Brief, page 44.) This case is distinguishable for the reason that the action was for cancellation of a deed from the State of Oregon to an individual grantee who subsequently deeded to the United States. It was properly held that the United States was a necessary party for no other relief was sought in that action. In the action at Bar monetary relief in the alternative is sought.

*Palmer v. Lantz* (Appellee's Brief, page 45.) In this action, as in the action in the case of *State v. Hyde,* the only relief sought was the cancellation of a deed. No monetary relief was sought. The judgment for cancellation was entered upon the default of the grantee and the court held that the default should be set aside.

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### APPELLANT'S EVIDENCE OF MUTUAL MISTAKE IS BINDING UPON THE COURT.

(Appellee's Brief, page 46.) The statement of the law appearing in the *Jurgens Co.* case (Appellee's Brief, page 46) does correctly state the law that testimony need not be accepted merely because it is not disputed or contradicted by the testimony of other witnesses, but testimony must be accepted unless contradicted, although to be sure, the contradiction may be found in its inherent improbability, the interest of the witness or the circumstances present in the case, but unless there be contradiction in some form, the

disregard of such testimony is arbitrary. As stated by Judge Woodrough in *Twentieth Century-Fox Film Corp. v. Dieckhaus* (C.C.A. 8 1946) 153 F. (2d) 893 at page 899:

> "Although our circuit has not had occasion to declare the law in cases involving plagiarism, it is thoroughly committed upon mature consideration to the doctrine that the law does not permit the oath of credible witnesses testifying to matters within their knowledge to be disregarded because of suspicion that they may be lying. There must be impeachment of such witness or substantial contradiction, or, if the circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point."

This Court has, in effect, announced the same rule in *Riggle v. Janss Inv. Corporation* (C.C.A. 9 1937) 88 F. (2d) 111, 116, in which the Court stated:

> "The only testimony as to that value is the testimony of the plaintiff. This is uncontradicted and must be assumed to be the reasonable compensation for the services performed by the plaintiff in the renting and collection of the rental of the apartments, and the general supervision during the period covered by the findings of the special master."

In *Joseph v. Village of Downers Grove* (C.C.A. 7 1939) 104 F. (2d) 974, 978, the Court stated:

> "No doubt, oral testimony offered to meet an exigency arising in a law suit, such as we find here, should be received with caution, and perhaps viewed with suspicion, especially where the testi-

> mony concerns an event alleged to have happened many years in the past. If such testimony comes from a responsible source, however, is positive in its character as it was here, especially when not contradicted, we see no reason why it should not be accepted as establishing the fact. Certainly, a court is not justified in arbitrarily refusing it."

The Appellee's argument on pages 49 to 55, inclusive, of its brief to the effect that there was no mistake made in the execution of the extension agreement identified as Change Order No. 1 represents a desperate attempt to accomplish legal alchemy—to distill gold out of a very base substance indeed. The Appellee describes the Appellant as "a smart businessman of some thirty years' experience" (page 53), and then spins a fanciful yarn based upon partial quotations and references to statements wholly out of context to induce this Court to believe that Appellant, "a smart businessman" would knowingly and without mistake turn over a heavy construction machine which even Appellee admits was worth in excess of $32,000.00 (R. 213, 214) for approximately $9,000.00 in additional rentals. The Appellant on cross-examination testified as follows:

> "Q. Did you give any consideration at that time to the fact that the equipment was actually operating practically continuously three shifts a day?
>
> A. If I had, I would not have agreed to the extension period. It is quite obvious. I was not going to jeopardize the entire—why, the recapture of the crane by a three months' rental for $9,-

000.00. I was not going to jeopardize a $30,000.00 piece of equipment."

(Note: The break in continuity in the testimony was due to an impediment of speech with which Appellant is afflicted.)

The ultimate answer to Appellee's fanciful argument is clearly supplied by the facts.

**Appellee can be restored to status quo.**

The Appellee bases its argument that it cannot be restored to status quo on an erroneous statement of fact. The original rental agreement covering the large 701 Crane had expired and Appellant was entitled to the return of the crane prior to the execution of the Change Order No. 1 extending the term and before the Change Order became effective. The original rental term expired on November 21, 1943. The Change Order was not executed and placed in the mail directed to Appellee until November 22, 1943 and the evidence does not show that even then had the Change Order been executed by the Appellee or approved by the United States Maritime Commission to make it effective. (R. 38, 71, 145, 208, 209.)

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## APPELLEE IS ESTOPPED TO OFFER THE TITLE OF THE UNITED STATES MARITIME COMMISSION AS A DEFENSE.

(Appellee's Brief, page 59.) The Appellee has misconstrued the Appellant's contention in this respect. The Appellant not only contends that the Appellee

was never authorized to claim title for the United States Maritime Commission, so far as the record of this case is concerned and from what Appellant knows of the facts, but Appellant also contends that this record does not show that the United States Maritime Commission or the United States of America has authorized the Appellee to defend this action upon the asserted title of the United States or the Commission. The law is clearly established that a bailee can assert a superior title in an action by the bailor only when he defends on such title and the defense must be by the authority of the third person. *Dodge v. Meyer* (1882), 61 Cal. 405, 423; *Palmtag v. Doutrick* (1881), 59 Cal. 154, 168; *Bondy v. American Transfer Co.* (1911), 15 Cal. App. 746, 749.

The quotation from *Corpus Juris Secundum* appearing on Appellee's Brief, page 59, is an accurate quotation, but it is respectfully submitted that that statement of the law is modified by the principle enunciated in the above cases. Appellant does not attempt to deny to Appellee the right to assert that title has passed according to the terms of the contract, but Appellant does insist that Appellee show that the United States of America has authorized the Appellee to interpose the defense. Is that too much? Is that not equitable? So far as the record shows and so far as the Appellant knows the facts to be, the Appellee has neither delivered the cranes to the United States, nor has received the authorization of the United States to interpose the alleged superior title of the United States. As pointed out by the Supreme Court in the case of

*The "Idaho"* (1876), 93 U. S. 575, 581, to permit the interposition of the asserted title of a third party without delivery to the third party or without the authority of the third party to interpose the defense of superior title would open the door to fraud on the part of the bailee.

Is not the following language from the case of *Blackorby v. Friend, Crosby & Co.,* 158 N.W. 708, 709, 134 Minn. 1, 8 C.J.S. 254, Note 81, stating the reason for the rule peculariy appropriate under the present circumstances?

> "One of the reasons assigned for this rule is that the bailee is given possession of the property by reason of the trust reposed in him by the bailor, and that good faith on his part requires him to restore to the bailor the advantage arising from possession of the property before asserting that the bailor is not entitled to it. To permit him to deny his bailor's title without surrendering possession would enable him to use his position of trust to cast upon the bailor the burden of proving title by a preponderance of the evidence, and perhaps in a foreign jurisdiction, when otherwise such burden would rest upon himself."

*Davis v. Donohoe-Kelly Banking Co.* (Appellee's Brief, page 59.) This case is not authority for the proposition cited. Appellee misstates the facts and hence draws an erroneous conclusion. The facts are these: A deposited a box with the defendant bailee with instructions to deliver the box to A or B. A was in fact the agent of B. In an action by a creditor of A, who sought to attach

the box, the Court held that the defendant bailee could set up the title of B, the principal, and to whom it had delivered the box, against the creditor.

**Appellant is entitled to reformation.**

All of Appellee's argument that Appellant is not entitled to rescission or reformation is based upon the proposition that these remedies "lie only where the written instrument fails to express the real transaction, * * * and the mistake must have been made in the drawing of the contract * * *." If we supply the one missing point that Appellee, for very obvious reasons, so insistently avoids, we find that all of Appellee's argument in this respect supports the Appellant's case. This fact is that the extension agreement identified as Change Order No. 1 does not express the mutual understanding of the parties that the void recapture clause should remain inoperative during the extended period. It was agreed between the parties that title to the crane would not be lost by Appellant should the rental period be extended. (R. 130, 288, 294.) Moreover, as stated before, the Change Order itself reaffirms all the terms and conditions of the original rental agreement and the nullity of the recapture clause was as much a term and condition of the original rental agreement as any others contained therein. At the trial the lower Court stated:

> "Did the Change Order reaffirm the contract? If it had, I do not think we would be here."

Mr. Johnson (counsel for the Appellee replied):

> "In terms it reaffirms the contract." (R. 298.)

## CONCLUSION.

Appellant submits that the judgment of the trial Court should be reversed and remanded, with instructions to enter findings of fact and conclusions of law in accordance with the evidence and the law governing the issues involved, thereafter issuing a judgment in conformity therewith.

Dated, San Francisco, California,
May 22, 1947.

Respectfully submitted,
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